UNITED STATES
v.
ROGER AND STEPHANIE CICHETTI

IBLA 77-494 Decided July 25, 1978

Appeal from decision by Administrative Law Judge Mesch declaring lode mining claims invalid. C 577.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Mining Claims: Hearings -- Rules of Practice: Government Contests

Where the Government contests a mining claim for lack of discovery, it assumes only the burden of making a prima facie showing that discovery is lacking, and the burden of showing a valuable discovery by a preponderance of the evidence then falls upon the claimants.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

3. Contest and Protest: Generally -- Evidence: Burden of Proof -- Mining Claims: Contests -- Rules of Practice: Government Contest

Where, in a mining contest, a contestee presents his own evidence, that evidence may be weighed against him notwithstanding any defects in the Government's case.

4. Mining Claims: Discovery: Generally

> A valuable discovery of a mineral deposit is established where a claimant, by a preponderance of the evidence, establishes the presence of mineralization which would justify a prudent man in expending his labor, time, and money on the claim with an expectation of developing a valuable mine.

APPEARANCES: Roger Cichetti, for Appellants; Esther M. Bolen, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for Appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Roger and Stephanie Cichetti have appealed from the July 6, 1977, decision by Administrative Law Judge Robert W. Mesch, declaring the Hopewell Lode Mining Claim, the amended Hopewell Lode Mining Claim, and the Rusty Horsehoe Lode Mining Claim, situated in Section 24, T. 2 N., R. 72 W., sixth principal meridian, Boulder County, Colorado, invalid for lack of discovery of a valuable mineral deposit.

On January 27, 1975, at the request of the Forest Service, the Bureau of Land Management initiated a contest by filing a complaint (as amended on July 19, 1975) charging that no valuable mineral deposits had been discovered within the limits of the claims.

Hearings before Judge Mesch were held on August 9, 1976, and on February 7, 1977, at Denver, Colorado. Warren C. Roberts, a Forest Service geologist testified on behalf of the Government. Kenneth W. Nickerson, a consulting geological engineer, Roger Cichetti, and two other witnesses testified on behalf of appellants.

Based on the testimony given by Roberts, the Judge reached the following conclusion:

> Applying the average prices for gold and silver during 1976 [gold -- $124.86 per ounce; silver -- $4.35 per ounce] to these figures [an average value of Roberts' samples comprising 0.118 ounce for gold and 0.27 ounce for silver] gives a monetary value of $14.73 for gold and $1.17 for silver, for a total value per ton of $15.90. I doubt that anyone would contend that a prudent person would be justified in mining, tramming, transporting, and milling the material * * * at this value.

(Dec. pp. 9-10). Based on appellants' own sampling and their figures relating to the cost of extraction, tramming, transporting, milling, and labor costs, the Judge further concluded:

> Using the average prices for gold and silver previously adopted gives a monetary value of $30.10 and $2.09 or a total of $32.19 per ton. On this basis, a prudent person, even if he was willing to accept Mr. Cichetti's revised cost figures, would not be justified in mining, tramming, transporting, and milling the material * * *.

(Dec. p. 12). The Judge summed up, as follows, the testimony given by appellants' witness Nickerson, who also took a sample:

> Based upon the results from his sample and his observations * * * he felt a prudent person would be justified in spending further time and money on the property with a reasonable prospect of success in developing a mine. When asked what a prudent person would be justified in doing, he suggested driving on the veins in the face, checking the cross veins, and then if the values hold up, some drilling, * * *, or raises to get an assay around the ore. He said at that stage it could go either way, it is a risky business.
>
> Mr. Nickerson readily recognized a distinction between exploration and development work, explained the distinction, and classified the property as being in the exploration stage or as a good prospect.

(Dec. p. 7). The Judge concluded from evidence presented by appellants' own witnesses, that the property was in the exploration rather than the development stage. He further found:

> No evidence was presented at either hearing of a geological nature or otherwise that would assist in construing the assay results or determining the quality and quantity of the mineralization that might be available for extraction. No satisfactory reasons were offered for the discrepancy in the assay values of the samples taken by Mr. Roberts and the samples taken by Mr. Cichetti.
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> * * * * * * *
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> On the basis of the evidence I do not believe a person of ordinary prudence could reach any reasonably sound decision concerning the value and the amount of mineralization that might be exploited in a mining operation. As a consequence, such a person certainly

would not, at this stage, spend his time and money in a mining venture.

(Dec. p. 13).

We find that the Judge's conclusions are fully supported by the evidence and therefore affirm his decision.

The major thrust of the appeal is a challenge to the competency and integrity of the Government geologist, Mr. Roberts. Appellants state that "the unacceptable and incomplete samplings performed by Mr. Roberts, as well as the variables introduced by different sample weights, are directly detrimental factors which should have influenced the decision by Judge Mesch." Appellants contend that Roberts purposely "camouflaged the true value of the mineral deposit * * * and has relied on his 20 years of experience as a mineral examiner to successfully distort the evidence which we have presented" (Statement of Reasons, pp. 2, 4). Appellants challenge virtually all actions taken by Roberts with respect to their claims as well as the bulk of his testimony, based on his examination thereof. They ask the Board "to disregard Mr. Roberts' entire testimony in order to construct an accurate account of the situation * * * without the overburden of false and misleading evidence introduced * * * by the incompetent and unqualified geologist * * *" (Statement of Reasons, pp. 6-7).

Appellants further contend that their operations are in the development, not the exploration stages, and that they were in fact working to extract discovered ore.

Appellants also take issue with the Judge's determination that no satisfactory reasons were offered for the discrepancy in assay values of the samples taken by Roberts and those taken by Cichetti. Appellants assert that any discrepancy was due to the fact that their ore samples were properly and correctly taken.

Appellants have raised numerous minor objections to the findings of fact and conclusions of law as set forth in the Judge's decision. We have reviewed these objections and find them too peripheral to the issues at hand to merit discussion.

[1, 2, 3] When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir.) cert. denied, 419 U.S. 834 (1974); United States v. Zweifel, 508 F.2d 1150 (10th

Cir. 1975). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Blomquist, 7 IBLA 351 (1972). It is true that the mineral examiner's conclusion must be based on reliable, probative evidence, United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971), but Government mineral examiners are not required to perform discovery work, to explore or sample beyond a claimant's workings, or to conduct drilling programs for the benefit of a claimant. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972).

The Government geologist, Mr. Roberts, visited appellants' property eight times and each time asked appellants to show him areas where they thought valuable mineralization had been found. Roberts gathered samples and obtained assay data. Based thereon he testified that a person of ordinary prudence would not be justified in spending further time and money on the property with a reasonable prospect of success in developing a paying mine. Thus, the Government has made its prima facie case, unless, as appellants contend, the evidence given by Roberts was tainted because he lacked integrity and professional competence.

We have reviewed the record and the Judge's decision and find no support therein for the pejorative accusations levelled against Roberts by appellants. Nor is the testimony of this witness devoid of probative worth, as appellants urge. In any event, and notwithstanding the evidence given by Roberts, the Judge evaluated in a light favorable to appellants, the evidence adduced by appellants' own witnesses on the ultimate question, i.e., the validity of the claims. Of pivotal importance to the Judge's conclusions was testimony by these witnesses indicating that operations on appellants' claims were in the exploratory stages. Where a contestee presents his own evidence, that evidence may be weighed against him even though there may be defects in the Government's case. United States v. Slater, 34 IBLA 31 (1978); United States v. Rogers, 32 IBLA 77 (1977); United States v. Arizona Mining and Refining Co., Inc., 27 IBLA 99 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[4] In view of the fact that the assay values shown by appellants' own samplings are insufficient to meet the "prudent man" test of mineral discovery we find no merit in appellants' contention that their sampling techniques were more diligent and accurate than the Government's. The prudent man test requires more than an isolated showing of high assay values. United States v. Vaux, 24 IBLA 289 (1976). That is, a showing that the mineral in question can be

extracted, removed, and presently marketed at a profit is required. United States v. Coleman, 390 U.S. 599 (1968). The evidence introduced by appellants fails to demonstrate such a showing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision declaring the above identified mining claims invalid is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge